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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/628,420	07/29/2003	Thomas Lee	006943.00310	6264
66811 7590 11/26/2008 BANNER & WITCOFF, LTD. and ATTORNEYS FOR CLIENT NO. 006943 10 SOUTH WACKER DR. SUITE 3000 CHICAGO, IL 60606				
EXAMINER				
CHAWLA, JYOTI				
ART UNIT		PAPER NUMBER		
1794				
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11/26/2008		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/628,420

Applicant(s)

LEE ET AL.

Examiner

JYOTI CHAWLA

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on August 1, 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 23-40 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 23-40 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-946)
- 3) ☐ Information Disclosure Statement(s) (PTO/SE/US)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Applicant's submission filed on August 1, 2008 has been entered. Independent claims 23-24, have been amended. Claims 23-40 are pending and examined in the application.

Claim Rejections - 35 USC § 112 (second paragraph)

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Rejections of claims 23 and 24 and their dependent claims under 35 U.S.C. 112, second paragraph, as being indefinite for the recitation of "increasing the pH of the lemon/lime flavored beverage to between about 3.2 and about 3.8" in step (b) and "wherein the lemon/lime flavor of the beverage is maintained and the beverage remains tart for at least seven months following manufacture" have been withdrawn in light of applicant's amendments to claims 23 and 24 of August 1, 2008.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

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(A) Claims 23-40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Braun et al (US 4830862) in view of combination of Van Ness (US 3245798), Lee et al (US 5348756), and Nakel et al (US 4551342).

The references and rejection are incorporated herein and as cited in the office action mailed May 2, 2008.

Regarding amended claims 23-28 and 35-40, Braun teaches a beverage compositions including lemon lime and cola flavored beverages (Columns 14-15) with acid component comprising citric, phosphoric and other edible acids including malic acid, fumaric acid and adipic acid and mixtures thereof, i.e., Braun teaches of edible acids having a smaller dissociation constant than citric and phosphoric acids, such as, adipic acid as instantly claimed. Braun also teaches of addition of salts including citrate and phosphate salts (Column 5, lines 53-68) to the beverage compositions as instantly claimed. Braun teaches carbonated beverages or soft drinks with lemon-lime and cola flavors (Column 8, line 58 and Column 9, lines 7-10, and Column 14, lines 10-15) as recited in claim 23, 24, 37, 38, 39 and 40. Braun also teaches that the level of acid component depends on the beverage composition, the mouth feel, taste and stability properties desired (Column 6, lines 1-6). Braun also teaches that the mixture of acids or the total acid component vary in beverage concentrates from 1.2 to 20% by weight and for other beverages the total acids vary in the range from 0.07 to 2% (Column 6, 1-26).

Regarding the pH and newly added limitations to step (b) of independent claims 23 and 24 "(b) increasing the pH of the lemon/lime flavored beverage by up to about 0.7 pH units until the beverage has a pH between about 3.2 and about 3.8 at the time of manufacture", Braun teaches that typical pH range for 2.5 to 5.0 and preferred pH range for carbonated beverages is from about 2.5 to about 4.5 (Column 10, lines 45-53), which includes applicant's recited pH range of about 3.2 to about 3.8. Thus, Braun teaches of lemon-lime flavored beverages having the pH in the recited range of the

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applicant. Regarding the desired pH of a beverage Braun (Column 10, lines 45-53) teaches that pH of a beverage depends on factors namely

1. Specific composition of the acid component;
2. total amount of acids used; and
3. Sourness impression desired.

Regarding the tartness (sourness) of the lemon/lime flavored beverage, as recited in claims 23 and 24, tartness of a beverage is closely related to the pH or the acidity of the beverage, i.e., the higher the acidity the more sour the beverage. Braun teaches of lemon lime flavored beverages having the pH in the recited range of the applicant, therefore, it would be obvious to one of ordinary skill in the art at the time of the invention that, the overall tartness of the beverage as taught by Braun would also be similar to the tartness of the instantly claimed invention.

Braun is silent about the amount of adipic acid in a beverage. Van Ness teaches addition of adipic and/or fumaric acids (both acids with smaller dissociation constants than citric and phosphoric acids) as acidulants in beverages when made soluble by the addition of surfactants. Van Ness teaches that adipic and fumaric acids are effective acidulants for beverages and are used either in place of citric acid or in addition to the citric acid (Column 1, lines 15-70) in order to acidify the beverages. Thus Van Ness provides further evidence that the addition of edible acids with smaller dissociation constants as compared to citric and phosphoric acids was known in the art of beverages at the time of the invention. Further it was also known that adipic or fumaric or both acids can be added in place of or in addition to citric acid in a beverage in order to alter the pH of the beverage as instantly claimed.

Regarding the tartness (sourness) of the lemon/lime flavored beverage, Lee teaches of powdered mixes for gels in various flavors and is solving the same problem as the applicant of maintaining sourness (tartness) in the gelable mix, without losing the gel strength. Lee teaches that by modifying the ratio of food acids with proper combination and ratio of buffer salts it is possible to raise the pH of the without lowering the desirable

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sour taste. Lee teaches of adipic, fumaric and citric acids as part of the acid component (Column 2, lines 32-42) and soluble phosphate and citrate salts as buffer salts at a ratio of 0.9-2: 1 and preferably of 1-1.5: 1 (column 2, lines 34-49). The range of the buffer salt ratio taught by Lee includes the ratios recited by the applicant in Claims 31 and 32. Thus it was known at the time of the invention that calcium sodium and /or potassium salts of citrate and phosphate in the relative proportion as taught by Lee raised the pH without lowering the tartness when added to foods (Lee Column 2, lines 7-15). Therefore, it would have been obvious to the one of ordinary skill in the art at the time of invention to modify Braun to include a specific ratio range of the buffer salts used in the composition as taught by Lee. One would have been motivated to do so in order to provide a beverage composition with increased pH while maintaining the desirable tartness and flavor.

Regarding the relative proportion of various acids in the beverage acidulant system for carbonated and non-carbonated beverages, Nakel et al, hereinafter Nakel, teaches beverages and beverage concentrates with improved flavor, desirable sweetness and sourness that could be controlled over a wide range of pH (column 2, lines 1-49) and the concentrates taught are storage stable and without the off flavors due to the insoluble salt formation on storage. Nakel teaches that by adjusting the concentration of acids in relation to the cations or buffer salts, it is possible to alter the pH and sourness (tartness) in the flavor of the resulting beverage (column 9, lines 10-17). Therefore, it would have been obvious to the one with ordinary skill in the art at the time of the invention to modify Braun based on the teachings from Nakel and include acids as taught the relative proportion as taught by Nakel in Embodiment 2 to achieve the desired stable (shelf stable) acidic beverage compositions. For further details of the calculations and teachings of Nakel, the applicant is referred to the previous office action dated May 2, 2008.

Thus the following was known about the beverages with acidulant and buffer system in the lemon-lime flavored beverages

- Addition of adipic acid (edible acids with smaller dissociation constants as compared to citric and phosphoric acids) as part of the acidic component in a lemon/lime flavored carbonated beverages (Braun).
- The amount of acidic component added in a beverage can be varied can be a mixture of acids depends on the beverage composition, the mouth feel, taste and stability properties desired (Braun, Column 6, lines 1-6). Thus it was known at the time of the invention that varying the amount of acid in beverage compositions affects the taste and stability of the beverage (Braun).
- Beverages, including carbonated beverages, have a preferred pH range of 2.5 to 4.5 which includes applicant's recited range (Braun).
- Different acids vary at least in the intensity of acidity, rate of development of acid and/or tart flavor and deterioration of acidity or tartness over time under storage conditions per unit amount. Thus varying the types of acids in beverage and amount of total acids added in the beverage compositions affects the taste and acidity as well as tartness of the beverage.
- Addition of adipic acid as an organic acid in the acidulant composition for making a beverage either in addition or in place of citric acid was known in the art at the time of the invention (Braun and Van Ness).
- Regarding the relative proportion of acids, it was known that by adjusting the concentration of acids in relation to the cations or buffer salts, it is possible to alter the pH and sourness (tartness) in the flavor of the resulting beverage (Nakel, column 9, lines 10-17).
- Edible organic acids in various combinations can be used to make a stable beverage if the total acidity is in the range taught by the formula of Nakel.
- Soluble phosphate and citrate salts as buffer in the ratios recited by the applicant raised the pH without lowering the tartness.

Thus altering the relative amounts of edible acids in a beverage composition was known to a skilled artisan at the time of the invention. Therefore, it would have been a matter of

routine optimization experimentation to one of ordinary skill at the time of the invention to modify beverage composition as taught by Braun and include organic acids such as adipic acid in relative amounts in order to keep the total acidity of the beverage in the desired range in order to make a beverage that has desirable tartness and pH and that remains stable upon storage, as taught by Nakel. It would also have been obvious to one of ordinary skill in the art at the time of the invention to vary the relative amounts of acids, based on the nature of acidity desired (e.g., early onset, delayed onset or sustained onset) or the availability of individual acid components at the time of the invention, as long as the total acid component falls in the acceptability range as taught by Nakel, which also includes applicant's recited range for claims 23-26. One would have been further motivated to make use of adipic acid as part of the acidulant system of the beverage, as adipic acid is less hygroscopic than other food acids and provides slow developing mild acid flavor, as compared to citric and phosphoric acids and it does not absorb moisture from the atmosphere as taught by Van Ness, which would make dry beverage components to remain free-flowing, easily transportable and having a longer shelf-life. It would also have been obvious to one of ordinary skill in the art at the time of the invention to substitute one art recognized functional equivalent (i.e. adipic acid) for another (i.e. malic/ succinic acid) in the beverage composition as disclosed by Braun in view of Nakel, depending on which acidulating agent was more available and affordable at the time the invention was made, as discussed above.

Further it is noted that while the prior art does not expressly teach the exact ratios, it was well known to use the acids listed in shelf stable beverages in different amounts in order obtain the desired flavor (Braun, Van Ness and Nakel). Therefore, it is not seen how the specific ratios claimed by the applicant would create an unexpected result as recited, absent any clear and convincing evidence and arguments to the contrary.

Regarding the newly added limitation to claims 23 and 24 that recite "for up to seven months following manufacture, the beverage is more tart than a beverage without said ratio", it is noted that the method as disclosed with its components is taught by the combination of references. Claims 23 and 24 do not recite any specific steps other than

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the combination of acidulant and buffer salts that is responsible for the beverage remaining tart for at least seven months. Since the prior art of record teaches that acids and buffers within the recited ratios were known to be added to foods and beverages for the reasons of increasing pH while maintaining tartness (recited by the applicant), therefore, not only will it be obvious to one of ordinary skill in the art at the time of the invention that the beverage with the taught acid and buffer system will have similar tartness and similar stability of tartness upon storage, but one will also have a reasonable expectation of success. Also regarding the limitation claims 23 and 24 that recite "beverage remains tart for at least seven months" it is noted that applicant has described the product with parameters which cannot be measured by the office for prior art comparison, because the office is not equipped to manufacture prior art products and compare them for patentability purposes. Therefore, as a prima facie case of obviousness has been properly established, the burden is shifted to the applicant to show that the prior art product is different. Thus, the invention as recited in claims 23 and 24 would have been obvious over Braun in view of combination of Van Ness, Lee and Nakel, absent any clear and convincing evidence and/or arguments to the contrary.

Regarding other limitations as recited in claims 25-40, the applicant is referred to the previous office action dated May 2, 2008.

Thus, the rejection of claims 23-40 are maintained for reasons of record and the invention as claimed would have been obvious over Braun in view of combination of Van Ness, Lee and Nakel, absent any clear and convincing evidence and/or arguments to the contrary.

Response to Arguments

Applicant's arguments filed August 1, 2008 have been fully considered but they have not been found

i) Applicants argument that Braun, Van Ness and Nakel do not teach the claimed invention as the references do not teach "increasing the pH of the lemon/lime flavored beverage by up to 0.7 pH units until the beverage has a pH between 3.2 and

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about 3.8 at the time of manufacture... the beverage is more tart than the beverage without said ratio" (Page 9, paragraph 3) has not been found persuasive. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Applicants' argument that Braun, Van Ness and Nakel do not teach the claimed invention has not been found persuasive for the following reasons:

a) Braun teaches lemon lime flavored beverages in the recited pH range as discussed above and in previous office action.

b) Braun and Van Ness have been discussed in the office action above. Regarding Nakel, the reference does teach of making a storage stable beverage and also provides a formula to calculate the acidity number and manipulate the relative proportions of acids in such a way as to achieve optimal acidity while also achieving storage stability. Thus as discussed above and in the previous office action, it was known in the art to use combinations of acids to achieve the tartness and acidity to make a shelf stable beverage. Further addition of buffer salts (citrate or phosphate salts) in the beverages as taught by Braun, was also known in the art at the time of the invention to adjust the pH or acidity of the beverages. Therefore, not only would it be obvious to one of ordinary skill in the art to modify the relative amounts of various acids to achieve various combinations of tartness, but one would also have a reasonable expectation of success in achieving a stable lemon/lime flavored beverage with the optimal combination of tartness and acidity, absent any clear and convincing evidence and/or arguments to the contrary.

ii) Applicant's argument that Nakel does not teach adipic acid (Remarks, page 10, paragraphs 1-2) has not been found persuasive. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In the above obviousness rejection Braun

and Van Ness teach of adipic acid as part of the acidulant system of a beverage. Further it is noted that the product as claimed has an acidulant system comprising citric acid and adipic acid for lemon/lime flavored beverage of claim 23, and citric acid, phosphoric acid and adipic acid for lemon/lime flavored cola beverage of claim 24, and a buffer system with sodium, potassium or calcium salts as recited in claims 29 and 30, which are also taught by Braun. Braun also teaches of selection of acid systems to provide desired tartness or sourness character to the beverage or the concentrate (Abstract and Columns 1 and 2), which is also the intent of the applicant. Therefore, Braun is also teaching a way of making a shelf stable lemon/lime flavored beverage with or without cola flavor, with or without carbonation as instantly claimed. Thus applicant's argument that the references do not teach adipic acid or the recited invention has not been found persuasive.

iii) In response to applicant's argument that "Lee ... relates to gelatin gels ...no lemon-lime beverages are disclosed in Lee (Page 11, paragraph 3) . Applicant's remark that Lee is not is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, Lee is also concerned with solving the same problem as the applicant of maintaining sourness (tartness) in an edible mix, without losing other valuable properties such as gel strength in gelatin mixes due to increased acidity. As a solution, Lee teaches that by modifying the ratio of food acids with proper combination and ratio of buffer salts it is possible to raise the pH of the without lowering the desirable sour taste. Lee teaches of adipic, fumaric and citric acids as part of the acid component (Column 2, lines 32-42) and soluble phosphate and citrate salts as buffer salts at a ratio of 0.9-2: 1 and preferably of 1-1.5: 1(column 2, lines 34-49). The range of the buffer salt ratio taught by Lee includes the ratios recited by the applicant in Claims 31 and 32. Therefore, Lee is also trying to solve the same problem

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and is therefore, reasonably pertinent to the particular problem with which the applicant was concerned. Please refer to previous office action dated may 2, 2008 for details.

iv) Regarding applicant's argument that "increasing the pH would increase stability, but that doing so would reduce the tartness of the beverage" and "increase the pH by up to 0.7 pH units until the beverage has a pH between 3.2 and about 3.8 at the time of manufacture to improve the stability of flavor because one of ordinary skill in the art would have expected that such a method would result in a beverage with unacceptably compromised tartness"(remarks, page 10, paragraph 3 to page 11, line 3) have not been found persuasive as the prior art of record does teach of making lemon-lime flavored beverages in the pH range of the applicant and the combination of references also teaches that relative proportions of acids as recited were also obvious to one of ordinary skill at the time the invention was made. Further regarding the tartness, it is well known in the art that edible acids differ from each other in level of acidity and tartness and the release of the acid and tart characteristics e.g., adipic acid has the lowest acidity of any food acids and imparts a slowly developing, smooth, mildly acid flavor and is non-hygroscopic, which is advantageous for powdered products in prolonging the shelf life, whereas citric acid provides sharp tart flavor and immediate acid taste. Thus optimization of acidity and tartness of a beverage composition by using varying proportions of edible acids for their known characteristic properties does not provide patentable distinction to the claims, absent any clear and convincing evidence and/or arguments to the contrary.

iv) In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a

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reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

As discussed in the office action above and dated May 2, 2008, the following was known about the beverages with acidulant and buffer system in the lemon-lime flavored beverages

- Addition of adipic acid (edible acids with smaller dissociation constants as compared to citric and phosphoric acids) as part of the acidic component in a lemon/lime flavored carbonated beverages (Braun).
- The amount of acidic component added in a beverage can be varied can be a mixture of acids depends on the beverage composition, the mouth feel, taste and stability properties desired (Braun, Column 6, lines 1-6). Thus it was known at the time of the invention that varying the amount of acid in beverage compositions affects the taste and stability of the beverage (Braun).
- Beverages, including carbonated beverages, have a preferred pH range of 2.5 to 4.5 which includes applicant's recited range (Braun).
- Different acids vary at least in the intensity of acidity, rate of development of acid and/or tart flavor and deterioration of acidity or tartness over time under storage conditions per unit amount. Thus varying the types of acids in beverage and amount of total acids added in the beverage compositions affects the taste and acidity as well as tartness of the beverage.
- Addition of adipic acid as an organic acid in the acidulant composition for making a beverage either in addition or in place of citric acid was known in the art at the time of the invention (Braun and Van Ness).
- Regarding the relative proportion of acids, it was known that by adjusting the concentration of acids in relation to the cations or buffer salts, it is possible to alter the pH and sourness (tartness) in the flavor of the resulting beverage (Nakel, column 9, lines 10-17).
- Edible organic acids in various combinations can be used to make a stable beverage if the total acidity is in the range taught by the formula of Nakel.

- Soluble phosphate and citrate salts as buffer in the ratios recited by the applicant raised the pH without lowering the tartness (Lee).

Thus, altering the relative amounts of edible acids in a beverage composition was known to a skilled artisan at the time of the invention. Therefore, it would have been a matter of routine optimization experimentation to one of ordinary skill at the time of the invention to modify beverage composition as taught by Braun and include organic acids such as adipic acid in relative amounts in order to keep the total acidity of the beverage in the desired range in order to make a beverage that has desirable tartness and pH and that remains stable upon storage, as taught by Nakel. It would also have been obvious to one of ordinary skill in the art at the time of the invention to vary the relative amounts of acids, based on the nature of acidity desired (e.g., early onset, delayed onset or sustained onset) or the availability of individual acid components at the time of the invention while maintaining the total acidity in the range taught by Braun. One would have been further motivated to make use of adipic acid as part of the acidulant system of the beverage, as adipic acid is less hygroscopic than other food acids and provides slow developing mild acid flavor, as compared to citric and phosphoric acids and it does not absorb moisture from the atmosphere as taught by Van Ness, which would make dry beverage components to remain free-flowing, easily transportable and having a longer shelf-life. It would also have been obvious to one of ordinary skill in the art at the time of the invention to substitute one art recognized functional equivalent (i.e. adipic acid) for another (i.e. malic/ succinic acid) in the beverage composition as disclosed by Braun in view of Nakel, depending on which acidulating agent was more available and affordable at the time the invention was made, as discussed above.

Also it is noted that other than adding acids and buffers in specific ratio the invention as claimed does not recite any specific method steps that would result in enhanced shelf stability. The prior art does teach similar ratios of acids and buffer salts and also provide motivation to use the acids listed in shelf stable beverages in different amounts in order obtain the desired flavor (Braun, Van Ness and Nakel). Therefore, it is not seen how the specific ratios claimed by the applicant would create an unexpected

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result as recited. Furthermore, in response to applicant's argument, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

Thus applicant's arguments filed August 1, 2008 have been fully considered but they are not persuasive and claims 23-40 remain rejected for the reasons of record.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, THIS ACTION IS MADE FINAL. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jyoti Chawla whose telephone number is (571) 272-8212. The examiner can normally be reached on 8:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JC/
Examiner
Art Unit 1794

/KEITH D. HENDRICKS/
Supervisory Patent Examiner, Art Unit 1794